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Craig A. Decker

THE CONSTRUCTION OF INDIAN TREATIES, AGREEMENTS, AND STATUTES

*Craig A. Decker**

It is often stated that Indian treaties, agreements, and statutes are to be liberally construed in favor of the Indians. Those on the Indian side of the cases embrace the tenet enthusiastically and vigorously urge its universal application. Those on the other side exude less enthusiasm and maintain that the tenet has but limited application. Basically this paper will attempt to show that the constructions applicable to bilaterally arranged Indian treaties and agreements should not control the constructions applied to unilaterally enacted statutes, especially statutes permitting Indian suits against the United States.[1]

Indian Treaties

The liberal construction doctrine, as discussed here, appears to have surfaced about 145 years ago in *Worcester v. Georgia*:

> The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense . . . .[2]

The doctrine was reaffirmed and its underpinning rationale expanded in *Jones v. Meehan*:

> In construing any treaty between the United States and an Indian tribe, it must always . . . be borne in mind that the negotiations for the treaty are conducted, on the part of the United States . . . by representatives skilled in diplomacy, masters of a written language, . . . and assisted by an interpreter employed by themselves; . . . that the Indians, on the other hand, are a weak and dependent people who . . . are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States . . . .[3]

*Assistant Chief, Indian Claims Section, Land and Natural Resources Division, United States Department of Justice. B.S., 1947, Brigham Young University; LL.B., 1950, University of Utah. Member of Utah and District of Columbia Bars.

The views expressed are solely those of the author and may not, at times, coincide with those of the Department of Justice. However, the author normally concurs in the limited application of the tenet of liberal construction on the side of the Indians.

And the Court concluded that "the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians...."[4] The *Jones* rationale provides compelling grounds for the application of a liberal construction in favor of disadvantaged Indians lacking understanding of both the English language and the English-American law.[5] The ruling thus was a good one and it appears that the liberal construction doctrine and its rationale, as developed in *Worcester* and *Jones*, have been repeatedly reflected in the Court's opinions down through the years.[6] But, as with most court rulings, subsequent decisions have tended to limit, to refine, and indeed, sometimes to confuse the rule as it was originally intended and enunciated. Here, one of the first major limitations of the liberal construction rule appears in *United States v. Choctaw & Chickasaw Nations*,[7] a case involving the status of the so-called Leased District situated between the Canadian and Red rivers in what is now the state of Oklahoma. After a careful review of the case, the Court of Claims, on its weighing of the equities and on the liberal construction doctrine as developed in *Worcester* and *Jones*, concluded that title in the subject lands had been retained by the Choctaws and Chickasaws and that the United States had breached its fiduciary duties to the tribes with respect to those lands.[8] However, on appeal to the Supreme Court, the case was reversed, with the Court stating:

> But in no case has it been adjudged that the courts could by mere interpretation or in deference to its view as to what was right under all the circumstances, incorporate into an Indian treaty something that was inconsistent with the clear import of its words. It has never been held that the obvious, palpable meaning of the words of an Indian treaty may be disregarded....[9]

Continuing, the Court pointed out that authority over Indian treaties, as other treaties, rested primarily in the political branches of our government, and the Court, quoting with approval from a prior case involving a non-Indian treaty, then stated: "We are to find out the intention of the parties by just rules of interpretation.... We are not at liberty to dispense with any of the conditions or requirements of the treaty, or to take away any qualification or integral part of any stipulation..."[10] These statements were in line with the Court's earlier statement that "If the words [of an Indian treaty] be clear and explicit, leaving no room to doubt what the parties intended, they must be interpreted

according to their natural and ordinary significance . . . ."[11] The above-noted limitations on liberal construction, enunciated in *Choctaw & Chickasaw*, has been followed through the years and reflects the law as it is today.[12] For example, in *Confederated Salish v. United States*, the Court of Claims stated:

> In fact, although plaintiff refers to "resolving an ambiguity," it would appear that plaintiff is really seeking to have us set aside the wording of the treaty and substitute in its place a substantially different description. This we are unwilling to do . . . . Our task in the present case is to construe the language of the treaty, not to rewrite it . . . .[13]

And even under the generous jurisdictional grants of the Indian Claims Commission Act,[14] which permits recovery as though the Indian treaties and agreements were revised in certain situations,[15] the Court of Claims has refused to permit constructions that would in effect be a rewriting of the terms of the treaties or agreements.[16]

Indian Agreements

During the eighteenth century and through nearly three-fourths of the nineteenth century, treaties were the customary vehicle by which the United States entered into agreements with the various Indian tribes.[17] However, by reason of the decrease in tribal sovereignty, and by the fact that the House of Representatives felt it should be involved in Indian compacts, the procedure was changed.[18] Thus, in an appropriation act of 1871, it was provided that "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty . . . ."[19]

After the 1871 Act, instead of treaties, the parties, *i.e.*, a tribe and the United States, adopted the agreement procedure for entering into their contracts.[20] The agreement procedure entailed negotiations between the tribal representatives and representatives of the United States very similar to those used in the prior treaty negotiations.[21] After the representatives had concluded an acceptable agreement, it was then submitted to both Houses of Congress for ratification.[22] The ratification of the agreement was, insofar as form was concerned, a statute passed by both Houses of Congress and signed by the President.[23]

Not surprisingly, with the agreements/statutes being in substance essentially the same as the prior treaties, these

agreements/statutes were given the same construction by the courts as had been given to the Indian treaties that preceded them.[24]

In *Choate v. Trapp*, the Choctaw and Chickasaw Indians contended that their land allotments were not subject to state taxation.[25] The question turned on whether the tax provisions of the Atoka Agreement/statute, previously entered into between the Choctaw and Chickasaw Tribes and the United States, and ratified by Congress,[26] should be strictly construed, as tax exemptions customarily are, or should be liberally construed, as Indian treaties generally are. The Court, after reviewing the tax exemption construction precedents, stated:

> 6. But in the Government's dealings with the Indians the rule is exactly the contrary. The constuction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith . . . .[27]

The Indians prevailed in *Choate*.[28]

Subsequently, in *Carpenter v. Shaw*, the Court had occasion to reaffirm its *Choate* position, with respect to the Atoka Agreement/statute, stating that, "While in general tax exemptions are not to be presumed . . . the contrary is the rule to be applied to tax exemptions secured to the Indians by agreement between them and the national government . . . ."[29] The Court then quoted *Choate*: "Such provisions are to be liberally construed. Doubtful expressions are to be resolved in favor of the weak and defenseless people who are wards of the nation, dependent upon its protection and good faith . . . ." And, after also quoting from *Worcester* and *Jones*, the Court ruled in favor of the Indians.

This writer has no quarrel with the liberal construction doctrines as developed in *Worcester, Jones, Choctaw & Chickasaw, Choate*, and *Carpenter* and believes the same represent sound law.[30]

The Statutes

Treaties and agreements/statutes are bilateral dealings and, as can be seen above, the courts try fairly to arrive at the intent of the parties to the dealings. Statutes as such, on the other hand, are unilateral acts of the United States and the inquiry should be directed singly to the intent of Congress. It is believed, however,

that there has been a tendency in some instances not to distinguish between the bilateral agreements, where there are, on occasion, compelling reasons to construe liberally in favor of an Indian intent, from the situations in unilaterally enacted statutes where the Indian intent is irrelevant. The confusion has arisen, at least to some extent, both with respect to statutes not involving a waiver of sovereign immunity as well as statutes permitting suits against the United States.

Statutes Not Involving a Waiver of Sovereign Immunity

The first major confusion of the bilateral rule with unilateral circumstances appears to be *Alaska Pacific Fisheries v. United States*.[31] There the Court analyzed the issue before it in these words: "The question is one of construction,—of determining what Congress intended by the words 'the body of lands known as Annette islands.'" So far, so good. This was solid rationale and in its following opinion the Court concluded that Congress intended that the Annette Island Reservation was to include the adjacent waters. But, thereafter the Court stated[32]: "This conclusion has support in the general rule that statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians. *Choate v. Trapp*, 224 U.S. 665, 675, . . ."[33]

As noted above, the *Choate* case was speaking solely of a bilateral agreement where it was eminently appropriate to liberally construe the doubtful expressions as the disadvantaged Indians actually understood them. However, in *Alaska* the Indian understanding was irrelevant; the inquiry should have been restricted solely to the unilateral intent of Congress.[34]

Nonetheless, the *Alaska* application of the *Choate* bilateral rule (oranges) to unilateral Indian legislation (bananas) continued.[35] In *United States v. Santa Fe Pacific Railroad*,[36] a case wherein the railroad company maintained that the aboriginal interest of the Indians had been extinguished by certain acts of Congress, the Court held:

> As stated in *Choate v. Trapp*, 224 U.S. 665, 675, the rule of construction recognized without exception for over a century has been that "doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nations, and dependent wholly upon its protection and good faith . . . ."[37]

In its more recent decisions, while not expressly rejecting the rationales of *Alaska* and *Santa Fe*, the Court appears to have in mind the logical distinction existing between the bilateral dealings and the unilateral statutes. Thus, in *McClanahan v. Arizona Tax Commission*,[38] relying in part on the liberal treaty construction doctrine and in part on the doctrine of *quasi*-sovereign immunity of tribes, the Court concluded that a Navajo Indian living and working on the reservation was not subject to state income tax. Significantly, however, the liberal treaty construction reliance was not enunciated with respect to a unilateral statute, as had been the case in *Alaska* and *Santa Fe*, but rather was restricted in application to the 1868 Navajo Treaty.[39] The Court, after noting the disadvantage of the Navajo Indians in entering into that treaty, stated:

> It is circumstances such as these which have led this Court in interpreting Indian treaties, to adopt the general rule that "[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930) . . . .[40]

Significant also in *McClanahan*, the Court restricted its examination of the unilateral statutes, relevant to the case, to determining the intent of Congress.[41]

In the 1977 *Rosebud Sioux* case,[42] it was argued that liberal construction should be applied to certain unilateral statutes of Congress respecting Indian reservation areas, the Court noting," [W]e are cautioned to follow the general rule that [d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are wards of the nation, dependent upon its protection and good faith . . . ."[43] The Court, however, went on to point out:

> But the "general rule" does not command a determination that reservation status survives in the face of congressionally manifested intent to the contrary . . . . In all cases, "the face of the Act," the "surrounding circumstances," and the "legislative history," are to be examined with an eye towards determining what congressional intent was . . . .[44]

And based on its review of the unilateral intent of Congress, the Court concluded against the Indians' contentions.[45]

With the proper distinction drawn between the constructions of bilateral agreements and treaties and the unilateral statutes made in *McClanahan* and *Rosebud Sioux*,[46] it may be that the illogical

applications of *Alaska* and *Santa Fe*, and the arguments based thereon, will have been put to rest.[47]

Statutes Permitting Indian Suits Against the United States

While, as noted above, unilateral statutes may or may not be appropriately liberally construed in favor of the Indians, depending upon the particular statute, it is submitted that there is one type of unilateral statute which calls for strict construction. This is the statute which waives the sovereign immunity of the United States and permits the Indians to sue the national government.[48]

Because the statutes waiving sovereign immunity to suit are as applicable to non-Indians as to Indians, many of the governing decisions in the field involve non-Indian plaintiffs. These include *Schillinger v. United States*, where the rule of construction was stated thus:

> The United States cannot be sued in their courts without their consent, and in granting such consent Congress has an absolute discretion to specify the cases and the contingencies in which the liability of the government is submitted to the courts for judicial determination. Beyond the letter of such consent, the courts may not go, no matter how beneficial they may deem or in fact might be their possession of a larger jurisdiction over the liabilities of the government.[49]

United States v. Sherwood used these words: "The section must be interpreted in the light of its function in giving consent of the Government to be sued, which consent, since it is a relinquishment of a sovereign immunity, must be strictly interpreted . . . ."[50] And *Soriano v. United States* voiced the rule in this fashion: "[T]his Court has long decided that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied . . . ."[51] Consistently, the same strict construction rule has been applied to statutes waiving sovereign immunity with respect to Indian claims against the United States. In *Klamath Indians v. United States*, where the sovereign immunity of the United States had been waived in favor of the Klamath Indian Tribe, the Court enunciated: "The Act grants a special privilege to plaintiffs and it is to be strictly construed and may not by implication be extended to cases not plainly within its terms . . . ."[52] In *Blackfeather v. United States*, the Court stated the rule in this manner: "As these statutes extend the jurisdiction of the Court of Claims and permit the Government to be sued for causes of action therein referred to, the

grant of jurisdiction must be shown clearly to cover the case before us, and if it does not, it will not be implied . . . ."[53] In *Sioux Tribe v. United States*,[54] the rule was phrased by the Court of Claims thus: "Suit may not be maintained against the United States in any case on a claim not clearly within the terms of the statute by which it consents to be sued . . . . Special jurisdictional acts are strictly construed and clear grant of authority must be found in the act . . . ."[55]

Despite the above clear-cut expressions that statutes permitting suits against the United States must be strictly construed, and that the same are applicable to Indians as well as non-Indians, arguments are sometimes advanced that such statutes should be liberally construed on behalf of the Indians. These surface frequently with respect to the litigation arising under the Indian Claims Commission Act and usually maintain that this Act represents broad, remedial legislation and on this basis is entitled to liberal construction. However, nearly all statutes waiving sovereign immunity serve a remedial purpose. Notwithstanding this, as seen in the cases cited above, the traditional rule of strict construction is applied to such statutes.[56] Moreover, with respect to the argument that the Indian Claims Commission Act[57] represents broad and general legislation, note these words of the Court of Claims from *Assiniboine Tribe v. United States*: "The Indian Claims Commission Act of August 13, 1946, is special legislation for the benefit of a particular class, just as jurisdictional acts waiving the statute of limitation, etc., and permitting suits had been in the past . . . ."[58] The Court then cited strict construction precedents as governing.[59]

As might also be expected, those urging liberal construction cite in support of their arguments the *Choate, Alaska*, and *Santa Fe* cases.[60] But as noted above, these three cases do not properly provide support. *Choate* involved a bilateral agreement and *Alaska* and *Santa Fe*, while involving unilaterally enacted statutes, appear to have erroneously applied the bilateral rationale to unilateral situations.[61] Quite aside from the above objections, it also should be noted that the *Choate, Alaska*, and *Santa Fe* cases were not suits against the United States. To the contrary, the United States was on the side of the Indians in all three cases. Plainly, these cases cannot serve as precedents for the proposition that statutes waiving sovereign immunity and permitting Indian suits against the United States are to be accorded liberal construction.

In addition to the above three cases, those who would overturn

the strict construction rule in Indian suits against the United States cite *Otoe*,[62] *Yankton Sioux*,[63] and *Snoqualmie*,[64] three cases decided by the Court of Claims under the provisions of the Indian Claims Commission Act. In *Otoe*, the court did pose the question of strict versus liberal construction of the Indian Claims Commission Act, and while citing *Choate, Alaska*, and *Santa Fe, supra*, never did decide the construction issue.[65] In *Yankton Sioux*[66] and *Snoqualmie*[67] the court applied liberal constructions, but these were limited to what the court considered to be pleading questions on which it concluded the modern rules of liberal pleading should govern. None of these decisions provide a challenge to the basic rule that Indian statutes waiving the sovereign immunity of the United States must be strictly construed.

More representative of the Court of Claims position, with respect to statutes waiving sovereign immunity, is its recent *en banc Mescalero* decision.[68] There the trial tribunal, the Indian Claims Commission, had allowed compound interest on the Indian judgment, but on appeal the Court of Claims reversed, pointing out that "[I]t is fundamental that the Government has sovereign immunity from suit except where Congress has by legislation expressly waived such immunity. This principle applies to claims for interest against the United States...."[69] The court noted that "[m]any cases have held that the waiver of sovereign immunity cannot be implied but must be unequivocally expressed...."[70] Among the cases thereafter quoted in support of the position was this statement: "It is beyond argument the United States may be sued only where its immunity has been specifically waived by statute, and that *such waiver may not be implied in the construction of an ambiguous statute...*,"[71] and: "jurisdiction to grant relief depends wholly upon the extent to which the United States has waived its sovereign immunity to suit and that *such a waiver cannot be implied but must be unequivocally expressed....*"[72]

The court then considered at length the many Supreme Court cases which had insisted on strict construction in the suits involving the waiver of sovereign immunity as applied to the interest question,[73] including this quotation from *United States v. New York Rayon Importing Co.*[74]: "Thus *there can be no consent by implication or by use of ambiguous language.... The consent necessary to waive the traditional immunity must be express, and it must be strictly construed.....*"[75] The court went on to reverse the Commission, concluding that no interest, compound or even simple, was permissible.[76]

For the above reasons, it is submitted that in Indian suits against the United States under a statute waiving sovereign immunity, the rule has always been and still is that the statute must be strictly construed against the Indians.

Conclusions

1. In construing bilateral Indian agreements (treaties and agreements) between the United States and the Indian tribes, courts will seek to arrive at what the parties to the agreement intended.[77]

2. If the terms of an agreement are clear, the courts will not resort to outside factors but will assign the terms of the agreement their natural meanings and arrive at the parties' intent from the agreement itself.[78]

3. If, however, a term of an agreement is ambiguous, the courts will look to relevant external factors that may aid its construction in determining the parties' intent.[79]

4. In considering external factors, at least if the Indians and their representatives are disadvantaged in their bargaining position and in understanding the agreement language and its legal consequences, the courts will utilize a liberal construction in determining the Indian intent.[80]

5. However, with respect to unilaterally enacted statutes dealing with Indian matters, the courts will seek to arrive at the intent of the Congress, the Indian intent being irrelevant.[81]

6. Some of these unilaterally enacted statutes, in arriving at the congressional intent, may, under settled statutory construction guidelines, warrant liberal construction, others may warrant strict constructions, while still others may warrant neither liberal nor strict constructions but require individualized treatment.[82]

7. However, among those unilaterally enacted Indian statutes which require strict constructions are those in which the United States has waived its sovereign immunity to suit and permits an Indian tribe to sue the sovereign.[83]

Thus, there is no single mode of construction for all Indian treaties, agreements, and statutes, and the interpreter of such instruments must decide, through a discriminating use of past precedents, which construction is appropriate in a given situation. To this end, hopefully, the above-discussed guidelines and demarcations may be helpful.

1. Of course, cases are not always won or lost merely by liberal or strict construction. But in given cases, the utilization of either liberal or strict construction may well tilt the ruling strongly one way or the other and be the deciding factor in the decision ultimately reached.

2. 31 U.S. (6 Pet.) 515, 582 (1832).

3. 175 U.S. 1, 10-11 (1899).

4. *Id.*

5. Other reasons, *e.g.*, the guardian and ward relationship, a powerful nation dealing with a weak and dependent nation, the lack of freedom of choice of the Indians, etc., are sometimes also assigned as grounds for construing the treaties favorably toward the Indians. *See also* Choctaw Nation v. Oklahoma, 397 U.S. 620, 630-31 (1970); Tulee v. Washington, 315 U.S. 681, 684-85 (1942); United States v. Winans, 198 U.S. 371, 380-81 (1905). *See generally* Choate v. Trapp, 224 U.S. 665 (1912) and Carpenter v. Shaw, 280 U.S. 363 (1930), discussed *infra.*

6. *E.g.*, Antoine v. Washington, 420 U.S. 194. 199 (1975); Puyallup Tribe v. Department of Game, 391 U.S. 392-98 (1968); United States v. Shoshone Tribe, 304 U.S. 111, 116 (1938); Minnesota v. Hitchcock, 185 U.S. 373, 396 (1902).

7. 179 U.S. 494 (1900). *See also* Shoshone Indians v. United States, 324 U.S. 335, 353 (1945); Choctaw Nation v. United States, 318 U.S. 423, 431-32 (1943).

8. Choctaw & Chickasaw Nations v. United States, 34 Ct. Cl. 17, 119-20 (1899), *rev'd*, 179 U.S. 494 (1900).

9. 179 U.S. at 532.

10. *Id.* at 533.

11. *Id.* at 531.

12. *Federal Indian Law* takes note of this in these words:"Indian treaties, while entitled to a certain amount of liberal construction, are to be construed nevertheless according to their tenor, and their terms are not to be varied by judicial construction in order to avoid alleged injustices." F. COHEN, FEDERAL INDIAN LAW 140 (1958).

13. 173 Ct. Cl. 398, 405 (1965). *See also* cases cited in note 6, *supra.*

14. 60 Stat. 1049 (1946), 25 U.S.C. § 70a (1970).

15. *Id.* § 2 and § 70a, respectively.

16. United States v. Nez Perce Tribe, 194 Ct. Cl. 490 (1971), *cert. denied*, 404 U.S. 872 (1972).

17. FEDERAL INDIAN LAW *supra* note 12, at 46-66

18. *Id.* at 66-67.

19. 16 Stat. 566 (1871), 25 U.S.C. § 71 (1970).

20. *See* FEDERAL INDIAN LAW, *supra* note 12, at 67. *See also* Antoine v. United States, 420 U.S. 194, 199-204 (1975).

21. Antoine v. United States, 420 U.S. 194 (1975).

22. *Id.*

23. *Id.*

24. *Id. See also* the *Choate* and *Carpenter* cases discussed *infra.*

25. 224 U.S. 665, 668-75 (1912).

26. 30 Stat. 505 (1898), *as amended*, 32 Stat. 657 (1902).

27. Choate v. Trapp, 224 U.S. 665, 675 (1912).

28. *Id.* at 679.

29. Carpenter v. Shaw, 280 U.S. 363, 366-67 (1930).

30. Of course, if the circumstances surrounding a United States-Indian agreement were to show that the Indians or their representatives knew and understood the terms of the agreement just as well as the representatives of the United States, and that their bargaining position was just as good, the basic reasons for liberal construction of such an agreement would no longer be present. *Compare* Delaware Indians v. Cherokee Nation, 193 U.S. 127, 140-41 (1904).

31. 248 U.S. 78, 87 (1918).

32. *Id.* at 89.

33. As noted above, while *Choate* did involve a statute insofar as form is concerned, with respect to substance an agreement was involved. This distinction appears to have been overlooked in *Alaska* and also in United States v. Santa Fe Pac. Ry., 314 U.S. 339 (1941). The distinction also appears to have gone unmarked in Otoe & Missouri Tribe v. United States, 131 Ct. Cl. 593 (1955), *cert. denied*, 350 U.S. 848 (1955).

34. In fairness to the Court, it appears to have decided *Alaska* without resort to the *Choate* doctrine but merely threw in the latter for good measure. *See* Alaska Pac. Fisheries v. United States, 248 U.S. 78, 87-89 (1918).

35. In objecting in this part to some of these past applications of the bilateral rationale to unilateral legislation, this writer does not mean to say that this necessarily rules out a liberal construction of unilateral Indian legislation. To the contrary, there may be other grounds, in given situations, warranting liberal construction, and to the extent a unilateral Indian statute falls within such legislation and is without countervailing reasons for strict construction, it would appear to be entitled to liberal construction.

36. 314 U.S. 339, 354 (1941).

37. *Id.* at 343-60. Although this portion of *Santa Fe* appears to have been primarily concerned with the construction of unilateral statutes, it did have overtones of agreements between the Indians and the United States. *Id.* at 347-57. And here again in fairness to the Court it must be said that the constructions applied to the statutes were secondary to the main issues considered.

38. 411 U.S. 164 (1973).

39. 15 Stat. 667 (1868).

40. McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 174 (1973).

41. *Id.* at 176-77.

42. Rosebud Sioux Tribe v. Kneip,—U.S.—, 97 S.Ct. 1361 (1977).

43. *Id.* at 1363.

44. *Id.*

45. *Id.* at 1363-77. The dissenting opinion urged liberal construction (*id.* at 1378-80), but significantly the Court did not adopt the rationale.

46. Note also that in Antoine v. Washington, 420 U.S. 194, 199-204 (1974), the Court points out advisedly that the statute there was one ratifying an Indian agreement and as such was subject to the same liberal construction accorded to Indian treaties.

47. However, in DeCoteau v. District County Ct., 420 U.S. 425, 444 (1975), the Court did not refer to the basic distinction between construing an Indian statute and an Indian treaty. However, the statute there appears to have been one of those subject to liberal construction rather than to strict construction. *Compare* Mattz v. Arnett, 412 U.S. 481, 504-505 (1973).

48. But, even under these statutes, Indian treaties and agreements are accorded their customary liberal constructions. However, if the claim rests upon construction of the statute permitting the suit, strict construction governs. The case of Peoria Tribe v. United States, 390 U.S. 468 (1968),illustrates this dichotomy. At page 470, the Court notes that strict construction is applicable to the Indian Claims Commission Act as in other statutes wherein the Unites States waives its sovereign immunity. But the Court went on to conclude that the issue there turned, not on the statute, but on the Peoria treaty and proceeded to accord the treaty liberal construction. *Id.* at 470-73.

49. 155 U.S. 163, 166 (1894).

50. 312 U.S. 584, 590 (1941).

51. 352 U.S. 270, 276 (1957).

52. 296 U.S. 244, 250 (1935).

53. 190 U.S. 368, 376 (1903).

54. 97 Ct. Cl. 613, 664 (1942), *cert. denied*, 318 U.S. 789 (1943).

55. *See also* Omaha Tribe v. United States, 253 U.S. 275, 281-83 (1920).

56. *Compare also* McMahon v. United States, 342 U.S. 25, 27 (1951): "While, as the court below pointed out, legislation for the benefit of seamen is to be construed liberally in their favor, it is equally true that statutes which waive immunity of the United States from suit are to be construed strictly in favor of the sovereign." [Citation omitted.] The Court ruled in favor of the United States. *Id.* at 27-28. *See to the same effect* United States v. Michel, 282 U.S. 656, 659-60 (1931).

57. 60 Stat. 1049 (1946), 25 U.S.C. §§ 70 *et. seq.* (1970).
58. 128 Ct. Cl. 617, 631 (1954), *cert. denied*, 348 U.S. 863 (1954).
59. *Id.* at 631-32.
60. *See* notes 17-25, *supra.*
61. *Id.*
62. Otoe & Missouri Tribe v. United States, 131 Ct. Cl. 593, *cert. denied*, 350 U.S. 848 (1955).
63. Yankton Sioux Tribe v. United States, 175 Ct. Cl. 564 (1966).
64. Snoqualmie Tribe v. United States, 178 Ct. Cl. 570 (1967).
65. Otoe & Missouri Tribe v. United States, 131 Ct. Cl. 593, 601-24, *cert. denied*, 350 U.S. 848 (1955).
66. Yankton Sioux Tribe v. United States, 175 Ct. Cl. 564, 568-69 (1966).
67. Snoqualmie Tribe v. United States, 178 Ct. Cl. 570, 585 -89 (1967).
68. United States v. Mescalero Apache Tribe, 207 Ct. Cl. 369 (1975), *cert. denied*, 425 U.S. 911 (1976).
69. *Id.* at 378.
70. *Id.* at 379.
71. *Id.*, *quoting from* General Mut. Ins. Co. v. United States, 119 F. Supp. 352, 354 (N.D.N.Y. 1953) (court's emphasis).
72. *Id.* at 380, *citing* United States v. King, 395 U.S. 1, 4 (1969) (court's emphasis).
73. Admittedly, the interest rule relates specifically to but one type of claim arising under the Indian Claims Commission Act, but the basic principle developed with respect thereto— the rule governing the waiver of sovereign immunity—would appear equally applicable to the other claims arising under the same Act.
74. *Id.* at 383.
75. *Id.* (court's emphasis); United States v. New York Rayon Importing Co., 329 U.S. 654, 659 (1946).
76. *Compare* Peoria Tribe v. United States, 390 U.S. 468, 470 (1968).
77. Jones v. Meehan, 175 U.S. 1 (1899); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).
78. United States v. Choctaw & Chickasaw Nations, 179 U.S. 494 (1900).
79. Jones v. Meehan, 175 U.S. 1 (1899); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).
80. *Id.*, both cases.
81. Rosebud Sioux Tribe v. Kneip,—U.S.—, 97 S.Ct. 1361 (1977).
82. *Compare* Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973): "The conceptual clarity of Mr. Chief Justice Marshall's view in Worcester v. Georgia, 6 Pet. 515, 556-561 (1832), has given way to more individualized treatment of particular treaties and specific federal statutes, including statehood enabling legislation, as they, taken together, affect the respective rights of the States, Indians, and the Federal Government." The Court appears also to have reached its decisions without resorting to either a liberal or strict construction in Washington Game Dep't v. Puyallup Tribe, 414 U.S. 44 (1973), in Menominee Tribe v. United States, 391 U.S. 404 (1968), and in FPC v. Tuscarora Indian Nation, 362 U.S. 99 (1960).
83. *See* 60 Stat. 1049, §§ 1-25 (1946), 25 U.S.C. §§ 70 *et. seq.* (1970); 60 Stat. 1049, § 24 (1946), 28 U.S.C. § 1505 (1970); and cases cited in notes 33-56, *supra.*